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# SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 81

JULIAN RILEY AND HUGHES SPALDING, AS EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, PETITIONERS,

vs.

THE NEW YORK TRUST COMPANY, AS ADMINISTRATOR C. T. A. OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, RESPONDENT.

## BRIEF FOR THE RESPONDENT

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# SUPREME COURT OF THE UNITED STATES

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No. 81

JULIAN RILEY AND HUGHES SPALDING, AS EXECUTORS OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, PETITIONERS,

vs.

THE NEW YORK TRUST COMPANY, AS ADMINISTRATOR C. T. A. OF THE ESTATE OF JULIA M. HUNGERFORD, DECEASED, RESPONDENT.

## BRIEF FOR THE RESPONDENT

### Statement of Case

We concur in petitioners' statement that the sole question involved before this Court is whether the Supreme Court of Delaware denied full faith and credit to a judgment of the Court of Ordinary of Fulton County, Georgia. The claim of petitioners is that this judgment binds respondent.

Respondent asserts on the contrary that it was not a party to the Georgia proceedings, and is not in privity with any party, and that for this, and other reasons to be hereinafter discussed, it is in nowise concluded by the Georgia judgment with respect to the decedent's domicile.

Petitioners raise no question about the sufficiency of the evidence to establish what the Supreme Court of Delaware held to be a fact, that in truth the decedent was domiciled in New York at the time of her death. No such question could be raised in this Court under this record. The contention of the petitioners is that the Delaware court was foreclosed by this Georgia judgment from considering this evidence at all.

We wish briefly to supplement the statement made by petitioners in their brief with respect to the Georgia proceedings. There was in the Georgia courts no actual contest with respect to the decendent's domicile. The proceedings in the Georgia courts were to probate the will of the decedent, and Hungerford, the husband of the decedent, in those proceedings raised the contention that domicile was not at issue, and should not be passed upon since, admittedly, there was real estate located in Fulton County, Georgia, which made it necessary to probate the will there. His contention in this respect was afterwards overruled by the Supreme Court of Georgia, but with the Chief Justice dissenting. (R. 109). What we wish to point out, however, is that there was actually no contested trial in Georgia with respect to the true domicile of the decedent.

The statement in petitioners' brief with respect to the appointment in New York of the Administrator c. t. a., is inaccurate, in that it is there stated that the appointment was ex parte. This was not the case. The appointment was made after non-resident service on all parties at issue. They

did not appear, but they received adequate notice for a proceeding in rem, such as the appointment of an administrator c. t. a., and had ample opportunity to appear. Petitioners also omit to state, with respect to this appointment, that the proceedings to probate the will in New York, and to appoint an administrator c. t. a. in that State, were initiated by the New York Tax Commission as the first step toward administering the estate of a deceased citizen of New York and collecting its taxes against that estate. As we later in this brief make a more complete statement with respect to these New York proceedings we do not here burden the brief with reference to the record.

Petitioners' statement also points out that one of the members of the Delaware Supreme Court dissented from the present judgment. This is correct, but as no dissenting opinion was filed we cannot assume that his dissent was on the constitutional point now before this Court. The issue of fact as to domicile was heatedly contested in Delaware, that being the only court in which an actual contest with respect to the decedent's domicile has ever been tried. It seems probable that this dissent was on this question of fact rather than on the constitutional point now before this Court, but as to this we have no way of speaking with certainty.

## Decision of the Supreme Court of Delaware.

An analysis of the decision of the Supreme Court of Delaware in this case is here necessary.

The case involved an interpleader between representatives of the estate of the decedent appointed by different States. The decedent's will had been probated in Georgia and the executors named in the will had qualified under the law of that State. The decedent's will had also been

probated in New York. The executors had refused to qualify there and an administrator c. t. a. had been appointed. Both the Georgia executors and the New York administrator c. t. a. claimed the right to have certain shares of stock owned by the decedent in the Coca-Cola International Corporation issued to them. This Delaware corporation brought this suit for an interpleader to determine for its own protection to whom these shares should be issued. The Delaware courts had jurisdiction under the Delaware statutes because the corporation was one formed under the Delaware law. Personal appearances were entered by both the Georgia executors and the New York administrator c. t. a., and no question of jurisdiction arises in the case.

There being no Delaware creditors of the decedent and no claimants in the State of Delaware, it was conceded by all parties that, while no doubt the State of Delaware could appoint an ancillary administrator in that State to administer these shares, there was no necessity for its doing so. The Delaware court, however, was faced with the question as to whether these shares should be sent to Georgia for administration by the executors or to New York for administration by the New York administrator c. t. a.

The first point ruled by the Delaware court was that these Delaware shares of stock should be sent for administration to the domiciliary representative of the decedent's estate.

As no question arises over the correctness of this rule we do not discuss it, but note in the margin authorities to the same effect.[1]

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[1] 11 R. C. L. 429-430; 24 C.J.1118; Petersen v. Chemical Bank, 32 N.Y.21; Vogel v. New York Life Ins. Co., 55 F. (2d) 205 (C.C.A.5); certiorari denied 287 U. S. 604; Croswell, Executors and Administrators, 152; Hutchins v. State Bank, 12 Metc. (Mass) 421; Putnam v. Pitney, 45 Minn.242, 47N.W.790; Jones v. Habersham, 107 U. S. 174.

The court also construed the relevant Delaware statutes as adopting the rule that assets of a deceased nonresident should be sent to the domiciliary representative. (R. 226).

It should be noted, however, that this is in no sense a rule of Federal constitutional law. There is nothing in the Federal Constitution which requires a state having personal assets of a decedent in its jurisdiction to send such assets for administration to the domiciliary representative for administration. The rule that a state will follow this course is merely a rule of comity, not of constitutional law. Under some circumstances a state may depart from this rule. See *In re Cornell*, 267 *N. Y.* 456, 196 *N. E.* 396; *certiorari denied*, 297 *U. S.* 708; *Frick v. Pennsylvania*, 268 *U. S.* 473.

The Supreme Court of Delaware next determined that the decedent had been domiciled in the State of New York at the time of her death, and hence that the New York administrator was the domiciliary representative of the estate. The Supreme Court of Delaware follows the traditional Chancery practice on appeal, in that the whole case is considered de novo. While according weight to findings of the Chancellor, the Supreme Court finally, for itself, determines questions of fact. The opinion of the Supreme Court in this record contains a full review of the evidence in the case on this point of domicile. Its findings on the evidence are amply sustained by the record, but as this Court will not review this finding of fact we do not undertake to summarize the evidence in this brief. It is sufficient to say that on ample evidence the Supreme Court of Delaware as a matter of fact found the domicile of the decedent to have been in the State of New York. From this it would follow as an inevitable conclusion of law that the New York administrator c. t. a. was the domiciliary representative of the estate.

The third point determined by the Supreme Court of Delaware is the only one now before this Court, namely: The Supreme Court of Delaware held that the New York administrator c. t. a. was not concluded by a Georgia judgment of the Court of Ordinary of Fulton County, which admitted to probate the will of the decedent upon a determination that the decendent was domiciled in Fulton County, Georgia, at the time of her death. It is now claimed that this ruling of the Supreme Court of Delaware denied to such Georgia judgment the full faith and credit required by the Federal Constitution. This point alone is before this Court for consideration.

While the Supreme Court of Delaware discusses the matter fully, one paragraph in its opinion accurately summarizes its ruling. Having pointed out that the New York administrator was not a party to the Georgia proceedings, and was not in privity with any party to those proceedings, the court says: (R. 230)

> "It is sufficient to say that the Georgia judgment, as a judgment in rem, binds only the property within the control of the Court which rendered it, and the property in controversy here is not within its control; and as a judgment in personam, it cannot bind the appellant, for it was neither a party to that judgment, nor was it in privity with a party."

This statement clearly was adopted from the language of this Court in *Thormann v. Frame,* 176 *U. S.* 350, where the Court, in speaking of a judgment of a probate court in Louisiana, said:

> "Now a judgment in rem binds only the property within the control of the court which rendered it; and a judgment in personam binds only the parties to that judgment and those in privity with them."

**Delaware Court Correctly Determined That Georgia Judgment Could Not Be Pleaded in Bar Against the New York Administrator C. T. A.**

As pointed out in the analysis of the decision of the Supreme Court of Delaware on this point, that decision rests upon three propositions:

(a) The Georgia judgment as a judgment in rem binds only property within the jurisdiction of the court rendering the judgment;

(b) As a judgment in personam it binds only parties and their privies;

(c) The New York administrator c. t. a. not being a party to the Georgia proceedings nor in privity with a party, is not barred by the judgment.

It is submitted that in thus holding, the Supreme Court of Delaware merely followed fully established principles of law as to which there will be found to be no conflict in the authorities. We consider them briefly:

(a)

In *Overby v. Gordon*, 177 *U. S.* 214, this Court had occasion to consider the operation of a Georgia judgment of probate which undertook to determine domicile. This Court announced that such a judgment was a judgment in rem, and while fully binding on all property within the State of Georgia, and hence within the jurisdiction of the court, it could have no binding effect as a judgment in rem outside of that State.

This Court has recently had occasion to announce a construction of the case of *Overby v. Gordon*. It states the exact proposition for which we contend.

In *Griffin v. McCoach, Trustee,* — *U. S.* —, 85 *L. ed.* 972, decided June 2, 1941, the Court says:

> "Overby v. Gordon holds that the adjucation of a probate court of Georgia that the decedent was a resident of that state was a proceeding in rem and did not bind the courts of the District of Columbia in a suit to determine anew decedent's domicil."

There appears to be no dispute whatever in the authorities over the proposition that a judgment of probate is primarily a judgment in rem, also that a judgment in rem has no binding effect on property outside of the jurisdiction in which it was rendered. Without unnecessarily laboring the point, therefore, we cite the following:

*Thormann v. Frame,* 176 *U. S.* 350;
*Dewey v. Des Moines,* 173 *U. S.* 193;
*Johnson v. Powers,* 139 *U. S.* 156;
*Pennoyer v. Neff,* 95 *U. S.* 714;
*Cooper v. Reynolds' Lessee,* 10 *Wall.* 308;
*Boswell's Lessee v. Otis,* 9 *How.* 336;
*Salmon Falls Mfg. Co. v. Midland Tire & Rubber Co.,* 285 *F.* 214, *C. C. A.* 6;
34 *C. J.* 1174;
31 *Am. Jur.,* 98, 99, 101.

In its opinion the Supreme Court of Delaware says:

> "It is admitted that the situs of the shares of stock in controversy is in this State." (R. 325)

In view of this admission, shown by the record on which the Supreme Court of Delaware acted, and was justified in acting, no question of situs can arise in this Court. It may be well to point out, however, that under the controlling Delaware law this admission that the situs of the stock was in Delaware was inevitable.

*Section* 73 of the Delaware Corporation Law (*Revised Code of Delaware*, 1935, §2105) is as follows:

> "For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of ownership of capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State."

Delaware decisions which are noted in the margin have given this section a broad interpretation as meaning that for all purposes except taxation, shares in a Delaware corporation are in legal contemplation situated in the State of Delaware.[2]

Delaware has never adopted the Uniform Stock Transfer Act, and the controlling statute is the one above quoted. All parties acquiesced in its validity and controlling effect, and it is, of course, far too late to raise any question now as to its constitutionality. No such question, however, could be raised as this Court has heretofore determined that it is entirely competent for a State incorporating a company to make a provision similar to this as to the situs of its shares.

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[2]Bouree v. Trust Francais, Etc., Oil Co., 14 Del.Ch. 332, 127 A. 56 (1924); Hunt v. Drug, Inc., 5 W. W. Harr. (Del.) 382, 156 A. 384 (1931); Penington v. Commonwealth Hotel Construction Corp., 18 Del. Ch. 170, 156 A. 259 (1931); Cantor v. Sachs, 18 Del. Ch. 359, 162 A. 73 (1932); Ellis v. Penn Beef Co., 9 Del. Ch. 213, 80 A. 666 (1911); Wightman v. San Francisco Bay Toll-Bridge Co., 16 Del. Ch. 200, 142 A. 783 (1928); Perrine v. Pennroad Corp., 19 Del. Ch. 368, 168 Atl. 196 (1933); Morgan v. Ownbey, 6 Boyce 379, 100 A. 411 (1916); 7 Boyce 297, 105 A. 838 (1917); Union National Bank v. Topkis Bros. Co., 2 A. (2d) 148 (Del. Ch. 1938); Nye Odorless Incinerator Corp. v. Nye Odorless Crematory Co., 18 Del. Ch. 179, 156 A. 176 (1931); Peyton v. Wm. C. Peyton Corp., 21 Del. Ch. 299, 187 A. 849 (1936); Bowles v. R. G. Dun-Bradstreet Corp., 12 A. (2d) 392 (Del. Ch. 1940); Skinner v. Educational Pictures Securities Corp., 14 Del. Ch. 417, 129 A. 857 (1926).

See *Jellenik v. Huron Copper Mining Co.*, 177 *U. S.* 1. Also, as to the power of a State incorporating a company to exercise this control over its shares of stock, see, *Baker v. Baker, Eccles & Co.*, 242 *U. S.* 394.

There is no suggestion in the record that Coca-Cola International Corporation, the shares of which are involved, was qualified to do business in Georgia, or did business there.

Georgia law, if relevant, also fixes the situs of these shares at the home office of the company issuing them, namely, in Delaware. There is no controlling statute on this point in Georgia, but the Georgia decisions are definite in this respect.

See:

*Arnold v. Arnold*, 62 *Ga.* 627;
*Peoples Bank v. Cleveland*, 117 *Ga.* 908, *particularly at p.* 916.

It thus appears that by admission of the parties, by Delaware law, and by Georgia law, the shares here involved were not property within the State of Georgia. Hence the Georgia judgment, as a judgment in rem, had no effect upon them.

(b)

It is, of course, true that an in rem proceeding may develop contests inter partes as to which adjudications are made, and the resulting judgment may to that extent and in that respect operate as a judgment in personam. The Supreme Court of Delaware recognized this proposition and in addition to considering the operation of the Georgia judgment as a judgment in rem, also gave consideration to that judgment as one in personam. In this respect also, however, the court properly held that the judgment could

not be pleaded as a bar against the New York administrator c. t. a.

It is a fundamental principle with respect to judgments in personam that they bind only parties and their privies. Indeed, the rule goes to the full extent of declaring that it is an unconstitutional deprivation of due process of law to enforce such a judgment against anyone not a party thereto or in privity with the party.

Thus the Court in the late case of *Hansberry v. Lee*, 311 *U. S.* 32, declared at p. 40:

> "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Pennoyer v. Neff*, 95 U. S. 714; I Freeman on Judgments (5th ed.) 407. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States, R. S. Sec. 905, 28 U. S. C. Sec. 687, prescribe, *Pennoyer v. Neff, supra; Lafayette Ins. Co. v. French*, 18 How. 404; *Hall v. Lanning*, 91 U. S. 160; *Baker v. Baker, Eccles & Co.*, 242 U. S. 394, and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments require. *Postal-Telegraph Cable Co. v. Newport*, 247 U. S. 464, *Old Wayne Mutual Life Assn. v. McDonough*, 204 U. S. 8."

Here again we are dealing with a principle that is so entirely free from conflict in the authorities that it is unnecessary to discuss it at length. The following additional authorities will be found in point:

*Johnson v. Powers*, 139 *U. S.* 156;
*Brooklyn, Etc. R. R. Co. v. Nat'l Bk.*, 102 *U. S.* 14;
*Sessions v. Johnson*, 95 *U. S.* 347;
*Humes v. Scruggs*, 94 *U. S.* 22;
*Ex Parte Howard*, 9 *Wall.* 175;
*Harris v. Hardeman*, 14 *How.* 334;
15 *R. C. L.* 1006;
30 *Am. Jur.* 951.

(c)

The administrator or executor of an estate is not in privity with the heirs or distributees and a judgment against the latter does not bind the former.

The universally recognized rule to this effect is thus stated in 34 *C. J.* 1038:

> "A judgment in a suit in which the heirs or devisees only are parties, will not conclude the personal representatives."

In *Freeman on Judgments, Vol.* 1, *Sec.* 492, the same rule is declared.

> "An administrator or executor is not ordinarily bound by a judgment against an heir or distributee, since he does not claim through or under him."

As illustrative of the rule, see:

*Howard v. Williams*, 228 *Ky.* 259, 14 *S. W.* (2*d*) 1096;
*Green v. Brown*, 146 *Ind.* 1, 44 *N. E.* 805;
*Chamberlain v. Fay, et al*, 205 *Ia.* 662, 216 *N. W.* 700;
*Forbes v. Douglass, Admr.*, 175 *Mass.* 191, 55 *N. E.* 847;
*Warren v. Hall's Exec.*, 10 *La.* 377;
*Cole Admr. v. Lafontaine, et al*, 84 *Ind.* 446, 151 *N. E.* 342;
*Dorr v. Stockdale, et al.*, 19 *Ia.* 269;
*Johnson, Admr. v. Longmire*, 39 *Ala.* 143.

The decision of the Supreme Court of Georgia in *Buchan, Admr. v. Williamson,* 142 *Ga.* 198, 82 *S. E.* 548 (1914), is here of great importance because it clearly announces the above rule. The special importance of a Georgia decision in this connection grows out of the rule that the full faith and credit provision in the Federal Constitution and the legislation of Congress in enforcement thereof, do not require that one state should give to the judgment of a sister state any greater force or effect than would be given such judgment in the state in which it was rendered. A more complete statement on this point is presented in another point in this brief. Its immediate application here is that when it appears clearly that under the Georgia law judgments affecting heirs and distributees only do not bind the personal representatives, then nothing in the Federal Constitution requires another state to treat such Georgia judgment as having the effect of binding the personal representative, since it would not have that effect in the state in which it was rendered.

*Buchan v. Williamson, supra,* clearly settled this point in Georgia, in conformity to the unbroken line of authority elsewhere. Under the Georgia law, title to land descends to the heirs-at-law, subject to the right of the administrator to administer the land. The heirs-at-law of the decedent there had brought a suit for a certain tract of land belonging to the decedent, the heirs claiming title under him. The court had adjudicated that the defendant in that suit had the better title. *Buchan v. Williamson, supra,* was a suit by the administratrix against the same defendant for the same piece of land, again asserting the decedent's title. An effort was made to set up the judgment against the heirs in the former suit. The Georgia court held that the administratrix was not bound by this judgment. The court says:

> "It thus appears that the parties plaintiff in the two suits were not identical. . . ."

The Court will bear in mind that all of the heirs-at-law had been parties to the first suit.

The court further says:

> "If the administrator should recover, and there should remain any property after paying the debts, whether the former judgment would conclude the heirs on distribution of the estate is not now for decision."

This is exactly the conclusion which the Delaware Supreme Court reached in the case at bar. (R. 228). That court pointed out that it was not then called upon to decide whether the distributees who were parties to the Georgia proceedings would be bound when the Surrogate's Court in New York came to distribute such excess as there might be out of the proceeds of these securities after creditors and taxes had been paid. The Delaware Court was, therefore, giving the Georgia judgment exactly the same force and effect which the Georgia Supreme Court had declared in *Buchan v. Williamson* should be given on a judgment in proceedings to which all distributees were parties, but to which the personal representative was not a party. The Federal Constitution required no more than that Delaware should give this Georgia judgment the same effect that it would be given in Georgia, and this clearly was done.

*Thomas v. Morrisett*, 76 *Ga.* 384, cited by opposing counsel, is not in conflict with *Buchan, Admr. v. Williamson, supra.* In the earlier case the Supreme Court of Georgia expressly points out that there were no creditors of the decedent in Georgia, where the second administration was obtained. Also, that this second administration "was manifestly collusive, and for that reason it was void." See p. 389.

Furthermore, *Thomas v. Morrisett* was by a divided bench, at a time when the court consisted of only three Justices. Two of them concurred and one dissented. *Buchan v. Williamson* is a later case by a full bench of six Justices, concurred in by all members of the court.

It is provided by statute in Georgia that in effect a decision by a divided court yields in authority to a full bench decision by a unanimous court. See *Georgia Code* §6-1611.

As to the general rule that the representative of an estate is not concluded by a judgment in a case in which heirs and distributees only are parties, there appears to be no conflict in the decisions.

Since these principles are so well settled that they can no longer be questioned, and since admittedly the New York administrator c. t. a. was not a party to the Georgia proceedings, we come to the question of how the petitioners in this case seek to avoid the controlling force of the rules of law to which we have referred. They are asking that the New York administrator c. t. a. be held barred by a Georgia judgment in proceedings to which it was a total stranger. They go further than this. They claim that this strange result is required by the full faith and credit clause of the Federal Constitution. We, therefore, next examine the theory on which the petitioners seek to arrive at this result.

## Petitioners' Theory on Which It Is Claimed New York Administrator C. T. A. Is Bound Is Unsound.

At this point of the discussion we are obviously at a turning point in the case, because unless there is some theory on which this case can be taken out of the controlling effect of the decisions heretofore cited, it is clear that the Delaware judgment is not only correct, but that any contrary judgment would have denied the New York administrator c. t. a. the due process of law guaranteed by the Fourteenth Amendment. (See: *Hansberry v. Lee*, 311 *U. S.* 32).

In many ways opposing counsel press the view that the Georgia judgment settled the succession to the decedent's estate and "was binding on all the world in any contest relating to the succession to the title to any personalty of the decedent." This position rests upon a confusion of thought at this point growing out of the fact that opposing counsel here fail to distinguish between the operation of a judgment in rem and a judgment in personam. A probate judgment is basically in rem, and with certain qualifications it is, within the jurisdiction rendering it, binding as fixing a status. This effect is attributed to it as a judgment in rem only. A judgment in personam, whether rendered in probate proceedings or otherwise, is not "binding on all the world". It is binding only on the parties and their privies. The distinction with respect to such judgments, and particularly with respect to probate judgments, is clearly pointed out in *Tilt v. Kelsey*, 207 *U. S.* 43. It has never been questioned. The suggestion that any judgment is binding in personam on "all the world" is simply contrary to all precedents, and, indeed, runs into constitutional difficulties, as pointed out in *Hansberry v. Lee, supra.* As a judgment in rem, the Georgia finding operates only in the State of Georgia, and on prop-

erty in Georgia. It may or may not be binding there on "all the world", but it certainly in not so binding with respect to property in Delaware. What opposing counsel are really doing here is taking a characteristic sometimes attributed to a judgment in rem in the state in which it is rendered, and seeking to apply it to a judgment as one in personam when asserted in another state.

Opposing counsel also press on the Court the decision in *Chicago, Rock Island & Pacific Ry. Co. v. Schendel,* 270 *U. S.* 611, and the cases following that decision.

The *Schendel* case announced the rule that "identity of parties is not a mere matter of form but of substance"; and also, that "parties nominally different may be in legal effect the same". With this proposition we have no quarrel; but the effort of petitioners to apply this doctrine to the present case is both contradicted by the facts in the record and unsound in point of law. The Schendel case, upon analysis, instead of supporting the position of opposing counsel in the case at bar shows its complete fallacy.

The administrator in the Schendel case was not suing for the benefit of the estate of the decedent but was suing to enforce a cause of action for homicide, the cause of action being given under the Federal Employers' Liability Act to the administrator as a special trustee for the benefit of the widow of the deceased. The question arose as to whether the administrator was bound by a judgment in a case brought by the widow under another statute under which she, as the beneficiary, could proceed in her own name. The court held that the administrator was so bound, but *based this holding solely on the ground that the administrator was not proceeding as a representative of the decendent's estate but as a special trustee for a particular cause of action.* A reading of this decision leaves no doubt that the court sus-

tained this bar solely because of the distinction we have noted. In effect the court points out that if the administrator had been proceeding as the general representative of the estate the former judgment could not have been pleaded in bar. The court says:

> *"Since the statutory authority of the administrator is to sue, not in his own right or for his own benefit or that of the estate, but in the right and for the sole benefit of the widow,* the same principles are applicable, in accordance with the general rule that 'whenever an action may properly be maintained or defended by a trustee in his representative capacity without joining the beneficiary, the latter is necessarily bound by the judgment.'" (Italics ours)

The state cases which have followed the Schendel decision, and which are pressed by opposing counsel, all make exactly the same distinction and use substantially the same language. Thus, for example, *Keith v. Willers Truck Service, Inc.*, 64 *S. D.* 274, 266 *N. W.* 256, 104 *A. L. R.* 1471, referring to cases holding administrator of an estate not bound by judgments against distributees, says:

> "These and other cases dealing with the tangible assets and debts of the estates of deceased persons present a different problem than cases involving causes of action given by a statute to a personal representative for the sole benefit of named beneficiaries. The recovery in an action for wrongful death is not for the benefit of the estate, but for the surviving spouse and next of kin."

Opposing counsel press next a dictum by Mr. Justice Pitney, speaking for this Court, in *Baker v. Baker, Eccles & Co.*, 242 *U. S.* 394. That dictum is entirely correct in the connection in which it is uttered. Opposing counsel, however, seek to apply it in a totally different connection and to draw from it a conclusion which, obviously, was never in-

tended. That case involved no quesion of the right to administer the property of a decedent, and involved no question of whether a personal representative of the decedent's estate was bound by a judgment against heirs and distributees. A Tennessee Chancery Court had rendered a decree with respect to who were the distributees of the estate. Thereafter, in a case in Kentucky (that being the case which came before this Court) it was sought to plead this Chancery judgment against a distributee who was not a party to the Chancery case. The Court held such a distributee was not bound. After reaching this conclusion Mr. Justice Pitney pointed out that it had been argued by counsel that there ought to be some way to bind all distributees where the distribution was determined by the question of domicile, and he correctly said that this could not be done unless a jurisdiction could be found in which all distributees could be made parties. It is a distortion of his statement to suggest that he meant anything more.

Now no one doubts that an individual may be bound by a plenary judgment in personam in a proceeding to which he is a party. (Whether he is so bound in any particuar case depends on the facts and circumstances of that case. There was in the case at bar no inquiry along this line, because distributees were not parties to the case at bar). It would, therefore, follow that if all distributees were made parties to a plenary suit in a court having jurisdiction it might be possible to bind all of them on the point of distribution. This, of course, is what Mr. Justice Pitney was saying. Equally, of course, an entirely different question arises when it is sought to bind an administrator of an estate by a judgment in a case to which he was not a party. The dictum in the Baker case is simply not in point on the facts of this case and gives no support to the position of opposing counsel.

Opposing counsel then advance what is, to us at least, a curious argument. They seem to recognize that substantial identity is necessary to establish the bar of a judgment in a subsequent case. By implication, though not expressly, they seem to recognize that there cannot be substantial identity in this respect between the New York administrator c. t. a. and the distributees, since the administrator c. t. a. would recover and administer the property also for the benefit of creditors and of the State of New York as a tax claimant. Then to avoid the effect of this obvious lack of identity they insist that it makes no difference, because neither the administrator c. t. a. nor creditors, nor tax claimants, had a right to be heard in the Georgia proceedings to probate the will; and since they had no right to be parties, they are, as counsel argue, bound by the judgment, even though they were not parties. To be sure we state counsel's position correctly at this point, we quote from their brief on page 16:

> "The Georgia judgment was binding upon the New York administrator in the contest in Delaware, involving succession to the title to assets of the estate, notwithstanding that the New York administrator was not a party to the Georgia proceedings and judgment, *because it was not entitled to be a party thereto,* and all persons interested in the question of the succession were parties." (Italics ours.)

Also:

> "***Neither the State of New York nor anyone else claiming as a creditor is affected by the finding of domicile in the Georgia proceedings."

(We shall point out a little later that the State of New York is affected by these Georgia proceedings, if they have the result counsel claims for them, to the extent that the possibility of New York collecting its taxes would be thereby destroyed).

Also:

> "A creditor or tax claimant is not entitled to be heard on the probate of a will, and hence after the succession has been determined cannot dispute the right or title of possession of the personal representative whose title has been established in the probate proceedings."

We fully agree with counsel that neither a creditor nor tax claimant, nor the New York administrator c. t. a., could have asserted the right to be heard in these Georgia probate proceedings; and being in accord on that point, we do not discuss it further.[3] The position of opposing counsel, however, that since none of these parties could appear in the Georgia proceedings, they would nevertheless be bound by the judgment there rendered as a judgment in personam, even though neither they nor their privies were or could be parties, is a conclusion that can in no possible way be sustained. Indeed, the fact that they could not in any way have appeared in such a proceeding is a conclusive reason for saying that they cannot be bound by the judgment as one in personam. The effect of such proceedings inside the State of Georgia as a judgment in rem, determining the status of the decedent's estate there, is, of course, a different matter.[4] What opposing counsel are attempting to do is to assert

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[3]See: 1 Page on Wills, 2d Ed., p. 931; Ann. L. R. A. 1918A, p. 456; Hooks v. Brown, 125 Ga. 122 (5), 53 S. E. 583.

[4]See in this connection the clear statement of this Court in Tilt v. Kelsey, 207 U. S. 43, quoting at length from Mr. Justice Holmes' opinion in Brigham v. Fayerweather, 140 Mass. 411, 5 N. E. 265. This Court holds: A judgment in rem *within the jurisdiction rendering the judgment*, is "conclusive on all the world in what we may call its legislative effect," but that "as strangers in interest are not entitled to be heard there is no reason why they should be bound by findings of fact." The application made with reference to a judgment of the New Jersey probate court was that "the full faith and credit due to the proceedings of the New Jersey court do not require that the courts of New York shall be bound by its adjudication on the question of domicile."

this judgment as a bar in personam. Their position, bluntly stated, is that one may be bound by a judgment in personam in a case to which he was not a party, provided it is made to appear that he was not legally entitled to be heard in the case. The non sequitur is, of course, obvious.

Another group of cases on which opposing counsel rely are the recent cases in which this Court has held that a party to a case may be estopped in a later case to question the jurisdiction of the court in the first case, if such party has in fact raised this issue as to jurisdiction and had it determined against him. They are: *Davis v. Davis,* 305 *U. S.* 32; *Sovereign Camp Woodmen of the World v. Bolin,* 305 *U. S.* 66; and *Stoll v. Gottlieb,* 305 *U. S.* 165. We point out later in this brief in another connection, that this Court, as late as the decision in *United States v. United States Fidelity & Guaranty Co.,* 309 *U. S.* 506, has indicated that its late decisions on the question of collateral attack on judgments are not to be understood as abandoning the distinction asserted in many decisions between strictly jurisdictional and merely quasi jurisdictional facts. It is necessary here to note only that the cases here pressed by opposing counsel are in no way applicable to the point immediately under discussion. They relate solely to how far a party to a case is bound by a judgment in that case as to the jurisdiction of the court when the question arises in later litigation. The question we are here dealing with is whether the judgment of the Georgia court is binding at all or in any respect, or in any particular, on one who was not a party to that case or in privity with a party, which is simply a different question.

Another case along a somewhat different line, pressed by opposing counsel, is the decision of the Circuit Court of Appeals of the Fifth Circuit in *Roberts v. Bathurst,* 112 *F.* (2*d*)

543. That case turned on the equitable doctrine of avoiding circuity of action. The court in its opinion puts its ruling finally on this equitable doctrine alone. The contest was between a Florida executrix and a Massachusetts administrator over the proceeds of a life insurance policy payable to the estate of the deceased. But it also appeared that the Florida executrix was the sole beneficiary entitled to the proceeds of the policy, no matter which representative might receive the money. The court finds it necessary to emphasize the fact that it affirmatively appeared that there were no debts of the decedent, saying: *"There are no debts to be paid."* In this situation, and solely "to avoid circuity of action" the court of appeals ordered the Florida executrix to collect the policy. It is perfectly clear from the opinion that a different result would have been reached had it not appeared that there were no debts of the estate. Hence, the necessary inference from the case, as applied to the case at bar, where there are both debts and tax claimants, is that the decision does not support the position of opposing counsel. Moreover, in that case, the court was not limited, as it is here, to a determination of the question as to whether the full faith and credit clause of the Federal Constitution was violated by the judgment being reviewed. The Delaware judgment, in the case at bar, is not subject to be reviewed by this Court in respect to the general equitable principles adopted by the court in the judgment.

Had petitioners wished to invoke the doctrine of avoiding circuity of action in any form at all appropriate to this case, it would have been necessary for them to have filed entirely different pleadings from those in the record. They have pleaded the Georgia judgment as a complete bar, and have not asked that it be considered from any other standpoint. Where it affirmatively appears that there are both creditors and tax claimants, then neither the principle of

avoiding circuity of action, nor any other rule of law can be invoked to make this judgment a complete bar. This being the only issue raised in the pleadings, it was not necessary for the court to consider anything else, nor did the court rule on anything further.

Also it is unnecessary to consider whether it would be possible to plead a judgment as a partial bar, where no substantial identity of parties is shown. There is certainly no precedent for anything of the kind, and there is no need to speculate about such a possibility in a case where it was not attempted. Futhermore, the whole question involved in *Roberts v. Bathurst, supra,* was the equitable doctrine of avoiding circuity of action. This is in no sense a principle of Federal constitutional law. The Federal courts are free to apply the doctrine in cases before them, as they may determine; but state courts have equal freedom.

**There Is No "Substantial Identity" Between the Administrator C. T. A. and the Distributees.**

We here restate the relevancy of the above statement, namely: There is no doubt about the proposition that the Georgia judgment as a judgment in rem does not bind property in Delaware, and as a judgment in personam binds only parties and their privies. There is also no doubt about the proposition that an administrator generally is not in privity with distributees, and hence is not bound by a judgment in personam against them. Petitioners seek to avoid the effect of these principles by asserting a theory of substantial identity—that is to say—they assert that the administrator c. t. a. represents the identical interests represented by the distributees. We have heretofore discussed decisions bearing on this contention. We now point out that under the facts of the present record no theory of substantial identity is appli-

cable. The reason for this is very simple, namely: The administrator c. t. a. does not represent merely the same interests as the distributees. On the contrary there are creditors of the estate, some of them in New York, and there are tax claims of the State of New York, all of which must be enforced through the administration of the estate.

This case arose on an interpleader, as heretofore stated. Each claimant of the stock was required to set out the basis of its claim. The administrator c. t. a. set out, among other things, "there are creditors of said estate residing and domiciled in the State of New York, who are interested in the proper and lawful administration of said estate." (R. 61). Again, by amendment, the administrator c. t. a. showed that "all creditors of the decedent, some of whom are residents of the State of New York, were interested in said estate." (R. 118). No issue was made on these averments and no proof was offered negating the general presumption that there are creditors of the estate. Actually, the controlling ruling with respect to the operation and effect of the Georgia judgment as a bar was invoked by a motion based on the pleading. See the decision of the late Chancellor Wolcott, commencing at page 134 in the record.

Hence the effort of the petitioners to show that there is substantial identity breaks down at the start, because there is no showing that there are no creditors of the estate.

As to the tax claims of the State of New York the showing is very emphatic. *The administrator c. t. a. was appointed primarily on the application of the New York Tax Commission as a necessary step in the collection of its tax claims.* There had been the appointment of a temporary administrator on the application of Hungerford, the husband of the deceased, but no application to probate the will in New York and no application for permanent administration there

had been made when, on June 12, 1936, the New York Tax Commission filed in the Surrogate's Court of New York County its application to probate this will, and for the appointment of an administrator c. t. a. (R. 76). The application points out that Mrs. Hungerford was domiciled in New York County, State of New York, at the time of her death; that she left an estate of over $500,000; that the Tax Commission is proceeding because of its duty to "enforce the payment of estate's taxes due the State of New York on the transfer of property of the deceased."

On the filing of this petition the Surrogate's Court made appropriate orders for the service on non-residents. (R. 82, and following).

Later, on October 15, 1937, Hungerford also filed a petition for probate of the will and appointment of an administrator c. t. a. On February 14, 1938, the Surrogate passed an order (R. 124) reciting the whole proceedings in the matter; reciting that the application of the State Tax Commission had been delayed by a restraining order issued by the District Court of the United States for the Southern District of Georgia, but that this restraining order had been discharged, and ordering that the proceedings filed by the State Tax Commission, and the proceedings filed by Hungerford, be consolidated.

The Surrogate's Court then passed an order (R. 126) adjudging that the deceased was domiciled in New York at the time of her death; ordering the probate of the will; and appointing the New York Trust Company as administrator c. t. a.

**New York Has the Sovereign Right to Control the Administration of the Estate of One Who Died Domiciled in New York, And Through That Administration to Collect Its Just Taxes. No Action by the Georgia Courts Could Bar This Right or Foreclose the State of New York on the Fact of Domicile.**

In its opinion in this case the Supreme Court of Delaware declared:

> "The appellant, however, is far more than being the representative of a mere creditor or tax claimant. Any claim that the State of New York may have for inheritance taxes or other taxes is not the basis of its right to be heard on the question of domicile. That right proceeds from the fact that the decedent was its domiciled citizen at the time of her death; and the appellant, appointed by the authority of its proper court, is its arm to gather together, in so far as is permited by law, the personal property of the deceased, and to administer and distribute the property according to her will and the laws of the State. Being the seat of domiciliary administration, it is not compelled to press its claim for taxes in a jurisdiction of ancillary administration." (R. 231).

It is difficult to see how there could be any real argument over this proposition of constitutional law; nor how there can be any doubt that this necessarily requires an affirmance of this judgment.

The Delaware Supreme Court has found, as a matter of fact, that the deceased was domiciled in the State of New York. The State of New York has sought and obtained administration in its Surrogate's Court on the estate of its deceased citizen, and has asserted its right to estate taxes.

The proposition of petitioner herein, however, is that certain proceedings in the courts of the State of Georgia, to

which of course, the State of New York was not and could not have been made a party, have the effect of barring the State of New York from thus administering the estate of its deceased citizen, and thus collecting through this administration, its just taxes. It is obvious that the State of Georgia, neither through its courts, nor in any other way, could create such a bar against the State of New York, nor could any proceedings in the State of Georgia have the effect of estopping the State of New York from asserting the true facts with respect to domicile, and on the basis of such facts, proceeding to collect its taxes.

It is, of course, one of the most familiar principles of our constitutional system that within their respective spheres each state is sovereign.[5]

Also, as this court said in *Wilkins v. Ellett*, 108 *U. S.* 256:

> "There is no doubt that the succession to the personal estate of a deceased person is governed by the law of his domicile at the time of his death, that the proper place for the principal administration of his estate is that domicile."

Statements to the same general effect have been made many times by the courts and by writers on legal subjects. It would be difficult to find any conflict in the authorities. Merely as illustrations of the universal recognition of the rule the following are quoted:

> "The general rule is that a decedent's domicile at the time of his death is the proper jurisdiction in which to obtain letters testamentary or of administration, irrespective of whether death occurred there or elsewhere." 21 *Am. Jur.* 398.

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[5]State of N. H. v. State of La., 108 U. S. 76; Collector v. Day, 11 Wall. 113; Abelman v. Booth, 21 How. 506; State of R. I. v. Commonwealth of Mass., 12 Pet. 657; Mayor, Alderman and Commonalty of City of N. Y. v. Miln, 11 Pet. 102; Buckner v. Finley, 2 Pet. 586.

> "It is a general rule that a decedent's domicil at the time of his death is the proper jurisdiction in which to obtain letters testamentary or of administration, and ordinarily it is the place of primary and exclusive jurisdiction in the settlement of his estate." 11 *R. C. L.* 69.

A large number of state cases could be cited. As illustrations, a few are noted in the footnote.[6]

The decision of the Supreme Court of Delaware correctly recognized that the State of the decedent's domicile not only had legal power to administer the personal estate of its deceased citizen but also could not be deprived of this right or estopped on the fact of domicile by proceedings in the courts of another sovereignty. Had the Supreme Court of Delaware rendered any other decision it would have departed from fundamental ideas which have long governed the relation of states to each other.

## New York Could Not Collect Its Estate Taxes Through the Georgia Courts.

Opposing counsel argue that the State of New York is not "affected by the finding of domicile in the Georgia proceedings." If by this is meant that that finding is not binding on the State of New York, we would agree fully with the statement, and would proceed from there to the next step, namely, that the State of New York, therefore, had the right to do what it in fact did do in this case, namely, proceed to obtain administration in that state on the estate of its deceased citizen, for the purpose, among other things, of

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[6]McCully v. Cooper, 114 Calif. 258, 46 Pac. 82; Rackemann v. Taylor, 204 Mass. 394, 90 N. E. 552; Brafman v. Brafman, 144 Md. 413, 125 Atl. 161; McEwen v. McEwen, 50 N. D. 662, 197 N. W. 862.

collecting its just taxes. If opposing counsel mean by "affected" (as we think they do) that the State of New York would not have been injured had the Georgia determination been held binding in Delaware, then the statement is unsound, because the actual effect would be to deprive the State of New York of the possibility of collecting its tax claims.

We refer here not to the practical difficulty the New York authorities would face when going into the State of Georgia to assert a claim to estate taxes. The practical difficulty is, of course, obvious, since the asserted right of New York to estate taxes is that the decedent was domiciled in New York, whereas the claim of the State of Georgia to estate taxes, and indeed the whole basis of the administration in the Georgia Court of Ordinary is on a directly contrary claim, namely, that the decedent was domiciled in Georgia. In addition to this practical difficulty, however, there is a complete legal bar which would prevent the State of New York from proceeding in the Georgia courts.

By an act approved January 3, 1938 (*Ga. Laws, Extra-Session* 1937-1938, *p.* 102) the State of Georgia provides:

> "The courts of this state shall recognize and enforce liabilities for taxation lawfully imposed by other states which extend like comity."

Hence the question of whether New York could assert its tax claims in the Court of Ordinary of Fulton County, Georgia, or in any other court in that state, depends, under this Georgia legislation, on whether New York extends like comity to other states. It seems to be definitely settled in New York that it does not extend such comity to other states. A clear statement of the rule in New York is found in, *In re Martin's Estate*, 136 *Misc.* 51, 240 *N. Y. S.* 393; affirmed

255 *N. Y.* 359, 174 *N. E.* 753. The Surrogate's Court in New York was administering the estate of one Martin, in which administration the State of Connecticut sought to appear "for the purpose of compelling executors to pay a transfer tax claimed to be due that state." The question therefore involved was whether one state could appear in the New York court having charge of the administration of the decedent's estate and there assert its claims for taxes. This is exactly what the State of New York would be compelled to do if it sought to collect in Georgia the tax claims asserted by New York.

Under the statute we have quoted, the controlling question in Georgia would be whether New York permitted such procedure. If not, then Georgia would not permit New York's tax claims to be thus asserted.

In the *Martin case,* the court first refers to *Colorado v. Harbeck,* 232 *N. Y.* 71, 133 *N. E.* 357, and to the *Matter of Bliss' Estate,* 121 *Misc.* 773, 202 *N. Y. S.* 185, as holding: "Our courts cannot be employed in aid of the collection of foreign taxes." The court then inquires whether a statute in New York known as the reciprocity statute had changed this situation, and reaches the conclusion that provisions of that statute related to reciprocity in other respects, but not reciprocity in the matter now under consideration. We quote as follows:

> "Connecticut claims, however, that the public policy of New York and the law of the Harbeck and Bliss cases have been fundamentally changed by the adoption of the reciprocal provision in our Tax Law (section 248-p). That statute was enacted by our Legislature in 1925. (Laws 1925, c. 143), and in the same year Connecticut adopted a similar statutory provision (Pub. Act Conn. 1925, c. 239). The purpose of this reciprocity legislation is laudable. It prevents, as be-

tween the co-operating states, the imposition of multiple taxes and avoids the necessity of conducting, in the estate of a New York resident, transfer tax proceedings in states having reciprocal statutes. It appears that 39 different jurisdictions, including many states of the Union, are within the reciprocal group. Multiple taxation has been abolished, and the need of reciprocal legislation has now been avoided by the sweeping decision of the United States Supreme Court, rendered January 6, 1930, in the case of Farmers' Loan & Trust Co. v. State of Minnesota, 280 U. S. 204, 50 S. Ct. 98, 74 L. ed.—. That decision specifically overruled Blackstone v. Miller, 188 U. S. 189, 23 S. Ct. 277, 47 L. ed. 439, and held that the transfer of property (other than tangible personal property and real property) cannot be taxed by a state against the estate of a nonresident. In other words, the succession to or transfer of intangible personal property, regardless of its actual situs, can now only be taxed validly in the state of domicile. But, in my opinion, the enactment of the reciprocal provision of our Tax Law did not change the rule of public policy laid down in the Harbeck case, that our courts cannot be used for the collection of foreign taxes."

See also: *Matter of Spitzer*, 170 *Misc.* 161, 9 *N. Y. S.* (2*d*) 868 (1939); *Estate of Mary Donovan, N. Y. L. J., June* 18, 1941, *p.* 2739, in which Surrogate Foley said:

"The courts of this State are not concerned with the collection of inheritance taxes levied by foreign governments or other states."

It thus seems clear that New York would not be permitted a hearing in the Georgia courts on this asserted tax liability. Hence, unless the present case is affirmed, this startling situation will result: A citizen of New York dies, but because of proceedings in Georgia courts the State of New York is barred from maintaining administration in that State on the securities of the deceased, and is required to

permit the State of Georgia to administer all of these securities, notwithstanding the fact that the State of New York would not have access to the Georgia courts even to assert its tax claims.

**The Federal Constitution Does Not Forestall Conflicting Decisions of Domicile by Different States. Nor Does It Forestall Action by Each State With Reference to the Decedent's Estate, Consistent With Its Determination of Domicile.**

This court gave a clear expression to the above principle in *Worcester County Trust Co. v. Riley,* 302 *U. S.* 292. The case involved a determination of whether the Federal Interpleader Act could, consistently with the Eleventh Amendment, be made the basis of a suit against tax officials in two different states, in each of which it was claimed the decedent had been domiciled. Each state was proceeding to collect taxes on the theory that the decedent was domiciled there. It was claimed that the decedent could not have been domiciled in two states and that as the Federal Constitution prohibited the taxation of the decedent's estate in the manner sought in a state in which the decedent was not domiciled, therefore, it was contended the bill could be sustained; to which this Court replied:

> "Petitioner's contention is that here the prospective official action of respondents involves a threatened violation of the Constitution for which state law can afford no sanction. It is said that as the officers of each state assert the right to collect the tax out of decedent's property within the state, they may succeed in establishing that right by a judicial determination in each that decedent was last domiciled there, cf. Dorrance's Estate, 309 Pa. 151, 163 A. 303; In re Estate of Dorrance, 115 N. J. Eq. 268, 170 A. 601; Id., 116 N. J.

Eq. 204, 172 A. 503, with New Jersey v. Pennsylvania, 287 U. S. 580, 53 S. Ct. 313, 77 L. Ed. 508; Dorrance v. Pennsylvania, 287 U. S. 660, 53 S. Ct. 222, 77 L. Ed. 570; Hill v. Martin, 296 U. S. 393, 56 S. Ct. 278, 80 L. Ed. 293, although he could not be domiciled in both; that neither state could constitutionally authorize its officials to impose the tax if decedent was last domiciled elsewhere, and petitioner is thus exposed to the danger of double taxation, which the Constitution forbids. See First National Bank v. Maine, 284 U. S. 312, 52 S. Ct. 174, 76 L. Ed. 313, 77 A. L. R. 1401; Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371, 65 A. L. R. 1000. As those officials threaten acts whose consequences may be taxation which is unauthorized by any valid state enactment, petitioner insists that the suit brought to restrain such action does not run against the state.

"But this argument confuses *the possibility of conflict of decisions of the courts of the two states, which the Constitution does not forestall*, with other types of action by state officers," etc. (Italics ours.)

There is obviously no difference between the power and right of a state to institute tax proceedings against the estate of one who it is claimed was domiciled there, on the one hand, and on the other, proceedings by a state to administer the estate of one who the State authorities claim was its domiciled citizen. *Worcester County Trust Co. v. Riley, supra,* seems to settle definitely—if, indeed, it needed to be settled—that nothing in the Federal Constitution prevents two states making conflicting findings of domicile and proceeding accordingly. This is what actually happened here. The appointment of the administrator c. t. a. in New York was invoked by the tax authorities of the State of New York as the first step, and a necessary step, in the assertion of the tax claims of that state.

**Delaware Supreme Court Was Bound to Give to Georgia Judgment Only Such "Faith and Credit" as It Would "Have By Law or Usage in the Courts" of Georgia. Petitioners' Failure to Prove the Georgia "Law or Usage" Prevents Their Claiming Proper "Faith and Credit" Was Denied to This Judgment.**

The Fourth Article of the Federal Constitution provides that each state shall give full faith and credit to the judgments of other states, and that Congress has the authority to determine the manner of proving such judgments "and the effects thereof."

Pursuant to this provision the Act of May 22, 1790 (1 *Stat.* 122), now *Sec.* 687 *of Title* 28 *U. S. C.*, provided that such judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

The decisions stating this rule are familiar and numerous; it is unnecesary to quote them here. They will be found collected in the notes to the above code section in U. S. C. A.

Therefore, the effect which the Delaware Supreme Court was required to give to this Georgia judgment was such effect as it would have "by law or usage in the courts" of the State of Georgia. Now the effect which petitioners seek to have given to this judgment is one that is not apparent on the face of the judgment. Where a judgment for the recovery of money is sued on in another state it would not ordinarily be necessary to prove that under the law of the State in which the judgment was rendered a judgment for the recovery of money has the effect of allowing a recovery of money. This is apparent on the face of the judgment

itself. Here, however, the judgment for which full faith and credit is claimed is sought to be used in a way that is not definitely settled by the face of the judgment itself. The face of the judgment does not purport to bind the administrator c. t. a. and petitioners assert that it ought to be treated as having the effect of binding the administrator c.t.a. Furthermore, the Supreme Court of Delaware found a fact, namely, the New York domicile of the decedent, which requires the conclusion that the Georgia court did not have jurisdiction of the subject matter on which it acted, namely, the establishment of a domiciliary administration of the decedent's estate.

The problems that arise under the Georgia law as to the effect to be given this judgment are these: Does a judgment against the distributees of an estate have the effect of binding the personal representative of the estate? Is the doctrine of substantial identity of parties with respect to the rule of res adjudicata recognized in the State of Georgia? If so, is there substantial identity between the distributees and the representative of the estate, where it also appears that there are creditors and tax claimants? May a judgment be collaterally attacked for lack of jurisdiction of the subject matter on which the court acted? All of these are questions of Georgia law which must be known before it can be determined whether the Georgia courts would give to this judgment the effect which is demanded for it by petitioners herein, and the Georgia law with respect to all of these matters must be known before the court could determine that the Delaware court had or had not denied to this Georgia judgment the full effect to which it was entitled under the constitution and laws of the United States.

The record in this case is perfectly silent as to what the Georgia law is on these points. Nothing was alleged as to it, and no proof was offered.

In *Lloyd v. Matthews,* 155 *U. S.* 222, this Court pointed out that in reviewing the judgment of a State court it could not take judicial cognizance of the laws of another state. We quote from that decision:

> "* * * The courts of the United States when exercising their original jurisdiction take notice, without proof, of the laws of the several states, but in the Supreme Court of the United States, when acting under its appellate jurisdiction, whatever was matter of fact in the state court whose judgment or decree is under review is matter of fact here. And whenever a court of one state is required to ascertain what effect a public act of another state has in that state, the law of such other state must be proved as a fact. * * *
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> "The court of appeals was obliged to determine the case on the record, and plaintiff in error had failed to plead the construction given the Ohio statutes by the courts of Ohio, or to introduce the printed books of cases adjudged in the State of Ohio, or to prove the common law of that state by the parol evidence of persons learned in that law, or to put in evidence the laws of that state as printed under the authority thereof, or a certified copy thereof, as provided by the law of Kentucky. * * *
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> "This record contains nothing to show, as matter of fact, that the public acts of Ohio had by law or usage in Ohio any other effect than was given them by the court of appeals of Kentucky."

See also:

*Hanley v. Donoghue,* 116 *U. S.* 1;
*Renaud v. Abbott,* 116 *U. S.* 277;
*Chicago, etc. RR. Co. v. Wiggins Ferry Co.,* 119 *U. S.* 615;
*Adam v. Saenger,* 303 *U. S.* 59.

It necessarily follows, therefore, that one who asserts that a judgment has been denied full force and effect must produce to the court in which the judgment is sought to be asserted adequate proof of the relevant legal rules of the State in which the judgment was rendered, and if he does not do so, his contention must fail. This has been specifically declared by this Court.

In *Gasquet v. Lapeyre*, 242 *U. S.* 367, this Court says:

> "There are several reasons why this assignment affords no basis for a review here, but the statement of one will suffice. What the Constitution and the congressional enactment require is that a judgment of a court of one state, if founded upon adequate jurisdiction of the parties and subject matter, shall be given the same faith and credit in a court of another state that it has by law or usage in the courts of the state of its rendition. This presupposes that the law or usage in the latter state will be brought to the attention of the court in the other state by appropriate allegation and proof, or in some other recognized mode; for the courts of one state are not presumed to know, and therefore not bound to take judicial notice of, the laws or usage of another state. Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; Chicago and A. R. Co. v. Wiggins Ferry Co., 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398; Lloyd v. Matthews, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70; Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 275, 50 L. ed. 220, 225, 35 Sup. Ct. Rep. 37. Here the law or usage in Tennessee, where the judgment was rendered, was not in any way brought to the attention of the Louisiana court, and therefore an essential step in invoking the full faith and credit clause was omitted. In this situation the claim that the Louisiana court refused to give effect to that clause is so devoid of merit as to be frivolous."

Delaware courts will not take cognizance of the law of another state.

*Nye Odorless Incinerator Corp. v. Felton*, 5 *W. W. Harr.* 236, 162 *Atl.* 506.

With reference to the question of whether under the Georgia law a judgment against distributees can be pleaded in bar against the representative of the estate, we have already pointed out in discussing this as a general rather than as a local question of law, that Georgia appears definitely in line with the uniform rule that a judgment cannot be so pleaded. See *Buchan, Admrx. v. Williamson*, 142 *Ga.* 198, 82 *S. E.* 548.

We shall not at this point undertake a presentation of the Georgia law as to whether a judgment can be collaterally attacked because of fundamental lack of jurisdiction of the court over the subject matter with respect to which it purports to act. If at the argument it should develop that the Court felt it possible, notwithstanding the cases heretofore cited, to take judicial cognizance of the Georgia law on this point, we would ask permission to file a supplemental brief. We believe that it can be pointed out that the Georgia statutes draw a distinction in this respect between a fundamental lack of jurisdiction of the subject matter, which renders the judgment absolutely void and subject to collateral attack, on the one hand, and on the other, those quasi jurisdictional matters which are regarded as only irregularities. We believe that we could also point out that while it may not be possible to reconcile all the dicta in the Georgia cases, the actual decisions are in accord with this distinction, and

the position here stated is squarely sustained by the late Georgia cases.[7]

The limitations on the extent to which the Court will in this case take judicial cognizance of the Georgia law merely brings us back, however, to the proposition that here was a burden definitely resting on petitioners, who asserted that the Georgia judgment had not been given full faith and credit. Petitioners failed to bear this burden.

The subject matter here, if the Georgia judgment is given the effect sought by opposing counsel, is the domiciliary administration of the decedent's estate—that is to say—the res on which the court attempted to act was the entire estate. That subject matter is dependent on domicile. Any court attempting to establish a domiciliary administration in a state other than the decedent's domicile is as fully dealing with a subject matter beyond the jurisdiction of the court as

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[7] *Ga. Code, Sec.* 110-709:

"Judgments void because of want of jurisdiction of court.—The judgment of a court having no jurisdiction of the person or subject-matter, or void for any other cause, is a mere nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it."

*Ga. Code, Sec.* 110-708, deals with irregularities—that is, in effect, with quasi jurisdictional matters, as follows:

"The judgment of a court of competent jurisdiction may not be collaterally attacked in any other court for irregularity, but shall be taken and held as a valid judgment until it is reversed or set aside."

*Ga. Code, Sec.* 110-701:

"How attacked. A void judgment may be attacked in any court and by any person. In all other cases judgments may not be impeached collaterally, but must be set aside by the court rendering them."

See: Elliott v. Elliott, 181 Ga. 545, 182 S. E. 845 (effort to enforce foreign judgment where jurisdiction of subject matter absent); Allen v. Baker, 188 Ga. 696, 4 S. E. (2d) 642; Montgomery v. Suttles, 191 Ga. 781, 13 S. E. (2d) 781; Durden v. Durden, 191 Ga. 404, 12 S. E. (2d) 305.

a prize court would be if it attempted to dispose of a ship which had not been taken.

With reference to a similar situation, in *Overby v. Gordon*, 177 *U. S.* 214, this Court, speaking of the effort of the Georgia Court of Ordinary to create a domiciliary administration, said:

> "The subject matter or res, upon which the power of the court was to be exercised was therefore the estate of the decedent."

Further the Court said:

> "The sovereignty of the State of Georgia and the jurisdiction of its courts, however, did not extend to and embrace property not situated within the territorial jurisdiction of the State."

In the case at bar there was in the Georgia courts no contest on the point of domicile. The only contest raised by Hungerford there was that according to his construction of the proceedings they were merely to probate a will (there being real estate in Fulton County, Georgia) and that it was no part of the case to consider the establishment of the domiciliary administration. This was at least not a frivolous contention, since the Chief Justice of Georgia thought the position well founded. See dissenting opinion of Russell, C. J. (R. 109). The majority of the court, however, sustained the proceeding as one to establish a domiciliary administration. (R. 108). The power of the Georgia court to do this depended on domicile. In the absence of domicile it was wholly without jurisdiction of the subject matter. Whether its judgment, lacking such fundamental jurisdiction of the subject matter, could be collaterally attacked is governed by the laws of the State of Georgia, which again brings us back to the unsustained burden placed upon the petitioners.

Petitioners cite certain cases of this Court which they claim have the effect of establishing a rule of res adjudicata to the effect that persons who are parties to a case cannot collaterally attack the judgment rendered, even if it appears that there is a fundamental lack of jurisdiction of the subject matter. We have heretofore pointed out that those cases have no bearing where the attempt is to plead the judgment against one not a party to the case in which it was rendered or in privity with a party. We now point out that for the reason above stated, where the question arises under the full faith and credit provision, the question is not what view of the law of res adjudicata this Court would take with respect to the federal courts, but on the contrary is what is the law of the state in which the judgment was rendered.

It is well, however, to point out also that the late cases from this Court, to which opposing counsel refer, do not establish any such principle of res adjudicata for the federal courts as is claimed by opposing counsel. The distinction between a fundamental lack of jurisdiction of the subject matter on the one hand and merely quasi jurisdictional facts on the other, is stated in many cases and by many law writers. No clearer statement has ever been made, however, than the statement of this Court in *Noble v. Union River Logging R. Co.*, 147 *U. S.* 165, from which we quote:

> "It is true that in every proceeding of a judicial nature there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as the service of process within the state upon the defendant in a common-law action, (D'Arcy v. Ketchum, 11 How, 165; Webster v. Reid, Id. 437; Harris v. Hardeman, 14 How. 334; Pennoyer v. Neff, 95 U. S. 714; Borden v.

Fitch, 15 Johns. 141;) the seizure and possession of the res within the bailiwick in a proceeding in rem, (Rose v. Himely, 4 Cranch, 241; Thompson v. Whitman, 18 Wall. 457;) a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged, (Galpin v. Page, 18 Wall 350; Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 11 Sup. Ct. Rep. 512.) So, if the court appoint an administrator of the estate of a living person, or, in a case where there is an executor capable of acting, (Griffith v. Frazier, 8 Cranch. 9) or condemns as lawful prize a vessel that was never captured, (Rose v. Himely, 4 Cranch, 241, 269,) or a court-martial proceeds and sentences a person not in the military or naval service, (Wise v. Withers, 3 Cranch, 331,) or the land department issues a patent for land which has already been reserved or granted to another person—the act is not voidable merely, but void. In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or subject-matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.

"There is, however, another class of facts which are termed 'quasi jurisdictional,' which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged, and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a federal court, which, when found by such court, cannot be questioned collaterally, (Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S. 552, 8 Sup. Ct. Rep. 217; In re Sawyer, 124 U. S. 200, 220, 8 Sup. Ct. Rep. 482); the existence and amount of

the debt of a petitioning debtor in an involuntary bankruptcy, (Michaels v. Post, 21 Wall. 398; Betts v. Bagley, 12 Pick. 572;) the fact that there is insufficient personal property to pay the debts of a decedent, when application is made to sell his real estate, (Comstock v. Crawford, 3 Wall. 396; Grignon's Lessee v. Astor, 2 How. 319; Florentine v. Barton, 2 Wall. 210;) the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors, (Thompson v. Tolmie, 2 Pet. 157;) and others of a kindred nature, where the want of jurisdiction does not go to the subject-matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act. Other cases of this description are: Hudson v. Guestier, 6 Cranch, 281; Ex parte Watkins, 3 Pet. 193; U. S. v. Arredondo, 6 Pet. 691, 709; Dyckman v. City of New York, 5 N. Y. 434; Jackson v. Crawfords, 12 Wend. 533; Jackson v. Robinson, 4 Wend. 436; Fisher v. Bassett, 9 Leigh, 119, 131; Wright v. Douglas, 10 Barb. 97, 111. In this class of cases, if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding; and, even if the court be imposed upon by false testimony, its finding can only be impeached in a proceeding instituted directly for that purpose. Simms v. Slacum, 3 Cranch, 300."

In one of its latest decisions this Court has declared that it is not to be understood as departing from this rule. In *United States v. U. S. Fidelity & Guaranty Co.*, 309 *U. S.* 506, counsel had evidently pressed upon the Court the contention that *Chicot County Drainage District v. Baxter State Bank*, 308 *U. S.* 371, had in effect overriden the doctrine of the *Noble* case. This court expressly disclaims any such intention. It says:

"In the *Chicot County* case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy. To this extent the case definitely extended the area of adjudications that may not be the subject of collateral attack. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status, extra-territorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts."

In the margin the Court cites, on the difference between "strictly jurisdictional and quasi jurisdictional facts," the *Noble* case, to which we have referred. On the subject of judgments relating to status, the Court cites in the margin, *Andrews v. Andrews,* 188 *U. S.* 14. On the subject of extra-territorial actions of courts, the Court cites in the margin, *Fall v. Eastin,* 215 *U. S.* 1.

The question, however, is one of state law.

Should it be claimed, on the distribution of any surplus from the securities here involved, after paying debts and taxes, that the distributees are bound by this Georgia judgment, all of these matters would no doubt be inquired into by the Surrogate's Court in New York. No decision was made with respect to them by the Supreme Court of Delaware, and no decision should have been made. The court properly refrained from intimating any opinion on such points.

**Domicile Being a Mixed Question of Law and of Fact, Georgia Judgment Determining Domicile Under Georgia Law Not Conclusive As to Domicile Under Delaware Law. Delaware Properly Applied Its Own Law.**

Nothing is better settled in the law of domicile than that it is a mixed question of law and fact.[8] From this it inevitably results, as stated in *Beale on Conflict of Laws, Vol.* 1, *p.* 105, that:

> "* * * The determination of domicile after all involves questions of law, and the law determining domicile may conceivably differ in several states. In such a case, each court in which the case arises must, of course, apply its own law, not the differing law of some other state."

Again, the same author says, *p.* 94:

> "It must always be remembered that the law of domicile of two states may vary and therefore that the courts of two states may reach different conclusions as to the domicile of a single individual. There is no super-law which can prevent such a result."

When the Georgia court determined the question of domicile under its laws, it therefore passed on a mixed question involving two elements, (1) the Georgia law, and (2) the facts. Similarly, the Delaware court in passing on the question of domicile under the Delaware law, passed upon a question involving two elements, (1) the Delaware law, and (2) the facts. There was no identity

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[8]For example, see Commonwealth of Pennsylvania v. Ravenel, 21 How. 103; Sweeney v. District of Columbia, 113 F. (2d) 25; and cases collected in 19 C. J., p. 441, Note 95.

between the two questions because of the variance in one of the elements.

This Court has recently given an emphatic statement to the effect that findings as to domicile may vary in different states, and that nothing in the full faith and credit clause of the Federal Constitution requires uniformity. It could not so require uniformity because to do so would require all of the states to follow the same law of domicile, whereas, necessarily, each state has entire freedom as to what rules of law with respect to domicile it will follow. Thus in *Worcester County Trust Co. v. Riley,* 302 *U. S.* 292, this Court said:

> "Neither the Fourteenth Amendment nor the full faith and credit clause of the Federal Constitution requires uniformity in the decisions of the courts of different states on questions of domicile, where the exertion of state power is dependent upon domicile within its boundaries."

In *Texas v. Florida,* 306 *U. S.* 398, this Court entertained an original bill to require several states to be bound by one determination of domicile. It should be noted however, that in order to do this the Court found it necessary to determine that the law of domicile was the same in each of those states. We quote from page 413:

> "In considering and weighing the evidence the Special Master concluded that there was no local law peculiar to any of the states with respect to the essential fact elements which go to establish domicile, and that the rule in each of the states defining domicil was substantially that of the common law."

It is a clear inference from this statement that had it not affirmatively appeared to the Court that the law of domicile was the same in each of those states the Court would not have found it possible to make a determination

of domicile binding in each state.

In the present case the Delaware court construed the controlling Delaware statute as meaning that assets of a decedent found in Delaware should be sent to the domiciliary representative. (R. 229.) That construction of the statute is as much a part of the statute as if the decision were written into the act itself. *Burns Mortgage Co. v. Fried*, 292 *U. S.* 487. There can, we believe, be no question but that the domicile intended by this Delaware statute is domicile according to the laws of Delaware and not according to the laws of some other state. To hold that the Delaware court was bound by the Georgia finding of domicile would mean that the Delaware court, in applying the Delaware statute under which domicile was a controlling factor, was bound by the Georgia law of domicile rather than by the Delaware law on that subject.

We know from this record what principles of law with respect to domicile, as applied to the facts in the present record, are treated by the Delaware court as the law of Delaware. We know this because the court discusses these principles fully in its decision. It makes no difference whatever that in many instances the court cites and relies on authorities from other jurisdictions. Finally, the rules applied by the Delaware court are accepted as the law of Delaware and applied as such. Some of the legal principles thus applied as the law of Delaware are of great importance in controlling the final conclusion reached. This Court does not know from this record, and has no way of knowing, whether these rules of law for determining domicile would be recognized and followed in Georgia or not. The only thing in the record is the decision of the Georgia court. (R. 108.) That decision makes no statement of the Georgia law. None was called for since there had been

no contest in the trial court on the point of domicile, Hungerford's contention having been that the point was not before the court for consideration.

With a total absence of proof as to what rules of law were in force in Georgia for determining domicile, the Delaware court was not obliged to take cognizance of the Georgia law in this respect, and for reasons heretofore pointed out this Court cannot take such cognizance. We have also pointed out heretofore that wherever the law of a state is material to one asserting that a judgment has been denied full faith and credit, the burden of proof with respect to proving that law rests upon such person.

We believe we can point out material differences between the law for determining domicile in Georgia and that in Delaware, differences which make the question of domicile a materially different question in the two states and which might well produce different conclusions from the same evidence.[9] Should it develop at the argument, notwithstanding cases heretofore cited, that this Court felt that it might take judicial cognizance of the Georgia law, we would ask leave to file a supplemental brief on this point

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[9]Merely as an illustration, if the Court will look to the published Georgia statutes it will find great emphasis placed on the physical residence of the wife in Georgia. While *Ga. Code* §79-403 provides generally that the domicile of a married woman is that of her husband, nevertheless the *Ga. Code* §79-401, provides:

> "The domicile of every person of full age, and laboring under no disability, is the place where the family of such person shall permanently reside, if in this State. If he has no family, or they do not reside in this State, the place where such person shall generally lodge shall be considered his domicile."

Where the wife is the entire family of the husband, as in the case at bar, her physical place of residence in Georgia might very well, under these sections, control the domicile of both, if that residence were with his approval. This is wholly contrary to the fundamental idea expressed by the Delaware court as the law of Delaware in this case. (R. 222). Other points could be noted, but we do not elaborate.

also. At the present time we point out that the failure of petitioners to prove what constitutes domicile under Georgia law makes it impossible to say that domicile under that law means the same thing as domicile under the Delaware law, and hence makes it impossible to say that the Georgia finding was denied full faith and credit in Delaware.

This point cannot be answered by saying that both Georgia and Delaware would determine the question of domicile according to the principles of the common law. In the first place the Court cannot know judicially, in the absence of proof, that those general principles which we speak of as the common law have not been modified by statutes in Georgia. In the second place, legal thinking no longer supposes that there is any general system of law known as "the common law" existing at large as a sort of super-system of law. There is only the common law (that is, the decisional law) of the several states. Each state settles this part of the law for itself and the determination by each state in this respect is binding on all other courts.

*Erie Railroad Co. v. Tompkins*, 304 *U. S.* 64;

*Klaxon Co. v. Stentor Electric Mfg. Co.*, decided June 2, 1941, 85 L. ed. 969, not yet published in bound official report.

## Conclusion

The authorities cited demonstrate conclusively that the decision of the Delaware court herein rests upon principles long established, namely, that a probate judgment as a judgment in rem, binds only property within the state

where rendered, and as a judgment in personam, binds only parties and their privies. They also demonstrate that the administrator c. t. a. was not in privity with any of the parties to the Georgia proceedings, and that there is no substantial identity between the administrator c. t. a. and the distributees. To have bound the administrator c. t. a. by this judgment would have been a denial of due process of law. We might have ended the brief at this point, but the other difficulties in the way of petitioners herein which we have pointed out are also insurmountable.

Opposing counsel in the conclusion to their brief suggest that great hardship may be worked on Delaware corporations if the decision of the Delaware court is sustained. Presumptively, however, the Supreme Court of Delaware, itself, knows what is necessary for the protection of corporations organized under the law of that state. The suggestion of counsel that there would be difficulty in transfers of stock certificates in such corporations by personal representatives in the future is wholly imaginary. Any representative of a decedent, domiciliary or ancillary, can make such transfer in the absence of a contest from another representative.[10] Where such contest does develop, as here, an interpleader can settle the matter, as it did here. On the other hand, the rule for which opposing counsel contend would enable the family of a wealthy man upon his death to defeat the legitimate claims of the state of his true domicile and avoid the law of that domicile by the simple device of having all persons interested appear and subject themselves to another jurisdiction, which they might prefer.

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[10]Restatement, Conflict of Laws, §477 (2).

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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